

## FINE ART CONSIGNMENT AGREEMENTS

Presented by John R. Cahill, Lynn & Cahill LLP

“I love the gallery, the arena of representation. It's a commercial world, and morality is based generally around economics, and that's taking place in the art gallery.”

—Jeff Koons

“I wish to be cremated. One tenth of my ashes shall be given to my agent, as written in our contract.”  
—From the Last Will and Testament of Julius “Groucho” Marx

### I. Basic Types of Consignment Agreements

- a. Collector-Dealer Agreements
- b. Artist-Dealer Agreements
- c. Auction House Agreements

The focus below is on “Collector-Dealer” Agreements.

### II. Basic Legal Terminology and Principles

- a. Collectors are usually “Consignors” giving the art to “Consignee”/Dealers to sell.
- b. The legal relationship between Consignor and Consignee falls under the law of “Agency.”
- c. Agents (Dealer-Consignees) owe a “fiduciary duty” to their Principals (Consignors).
  - i. A “fiduciary duty” is the highest form of duty in the law. How high? Here is a famous formulation by the late,

great Justice Cardozo. He called it “the duty of the finest loyalty” and went on eloquently in a famous case:

*Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to **something stricter than the morals of the market place**. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty . . . Only thus has the level of conduct for fiduciaries been kept at **a level higher than that trodden by the crowd**.*

- ii. This was applied to art agents most dramatically back in the 1980's in *Cristallina v. Christie's*:

*[The Agent] has a fiduciary duty to act in the utmost good faith and in the interest of ... its principal . . .*

- d. Agents can, however, modify—that is, lessen—their fiduciary duties by contract.

### III. Subjects That Should Be Addressed in Consignment Agreements

#### a. Basic Business Terms

- i. Sale Price
- ii. Commission (percentage or “net”?)
- iii. Length of Consignment
- iv. Expenses (Shipping, packing, advertising, etc.)
- v. Selling methods (e.g., exhibition, limited private showings, “shopping,” etc.)
  1. Use of images (copyright)
- vi. Return

#### b. Basic Legal Issues

- i. Risk of Physical Loss and Damage (Insurance)
  1. Storage and Exhibition considerations (light, temperature, etc.)
  2. Authorization for cleaning, conservation, framing, relining, etc.
- ii. Risk of “Legal” Loss or Damage (e.g., title claims, seizures, etc.)
  1. There should be representations & warranties about:
    - a. Title
      - i. Liens and Encumbrances
    - b. Authenticity
    - c. Condition
    - d. Authority to Sell (Agents, estates, corporations, couples, etc.)
    - e. Import/Export
    - f. Cultural Property Laws
    - g. Commissions payable to others
  2. In general, Consignees want indemnification and Consignors don’t.

#### iii. UCC Filings

#### iv. Right to Research and Consult Experts

#### v. Right to Terminate (e.g., bankruptcy, material breach)

#### vi. Dispute Resolution

1. Arbitration or Court lawsuit
2. Controlling law
3. Attorneys’ fees

#### vii. Notices and Record Keeping

#### viii. Confidentiality

1. Price
2. Parties
3. When Confidentiality may be breached
  - a. Subpoena or other legal process
  - b. Claim by buyer

### IV. Issues to be Carefully Considered by Dealer-Consignees

#### a. Conflicts

#### b. Multi-dealer issues

#### c. Competence to handle consignment

#### d. Due Diligence

##### i. ALR

##### ii. Lien Searches

##### iii. Interpol

##### iv. Research

##### v. Conservators



## DeWitt Stern

- e. Sales Tax
- f. Money Laundering
- g. Insurance
- h. Right to disclose principal under certain circumstances

- ii. Capital Gains
- iii. Resale Royalties (California)

- h. Insurance (including being an “additional loss payee” and cancellation notice)

### V. Issues to be Carefully Considered by Consignors

- a. Consignee Solvency
  - i. UCC filing
  - ii. Due Diligence
- b. Purchaser Solvency
  - i. Conditions to Release (e.g., payment in advance, escrows)
- c. Consignee Competence
- d. Commissions
  - i. “Double-Dipping”
  - ii. Conflicts
  - iii. “Net” Pricing
- e. Restricting “Shopping” and “Assignment”
- f. Disclaimers (e.g., authenticity and “the best of my knowledge”)
- g. Taxes
  - i. Sales

### VI. What Can Go Wrong: A Few Examples

- a. Bankruptcy (Berry Hill and Salander )
- b. Damage
- c. Deal Breakers (Würth)
- d. Crooks (Michel Cohen)
- e. Consider using an attorney before you need one. Per Cosmo Castorini,<sup>2</sup> “There are three kinds of pipe. There's aluminum, which is garbage. There's bronze, which is pretty good, unless something goes wrong. And something always goes wrong. Then, there's copper, which is the only pipe I use. It costs money. It costs money because it saves money.” So too with lawyers: they cost money because they save money. At least some of the time.

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<sup>1</sup> According to Mr. Salander, “Our society now values a Warhol for three times as much money as a great Rembrandt. That tells me that we’re f@#!\*d.” Some of those who consigned works to Mr. Salander without filing a UCC-1 have been heard to utter similar expressions.

<sup>2</sup> Moonstruck (1987).

## “UCC’S”: THE BASICS YOU NEED TO KNOW

Presented by Ralph Lerner, Withers Bergman LLP

- a. “UCC” refers to a group of laws, passed in every state based on the recommendations of a panel of expert lawyers, called the “Uniform Commercial Code.”
- b. The UCC can vary a bit from state to state, but the general idea is to give everyone who does business certainty and confidence about the outcome of their commercial transactions.
- c. Art sales are generally treated no differently from other commercial transactions and art is generally treated as personal property under the UCC. Artists and their heirs are treated differently and are, to put it simplistically, exempt from the UCC when consigning works to dealers. As Annie Leibovitz is finding out, a UCC can also be filed and give a security interest in “intellectual property,” such as the right to reproduce images of fine art.
- d. The UCC is divided up into different articles. “Article 9” deals with “security interests,” which are basically the right of an owner or lender to have their interest in property protected.
- e. What most people think of as a “UCC” is a form called a UCC-1 that is filed with a government agency (often at the state level) to give the public notice of the filer’s interest in the property. Some people find it helpful to think of the UCC-1 as a kind of mortgage on personal property—including on fine art.
- f. “First in time, first in right” is the rule. In other words, the first person to file a UCC-1 form has priority over the next person. If there is a bankruptcy, for example, and the property on which there are UCC’s (aka the “collateral”) is sold, the person who filed the first UCC gets paid first out of the proceeds of the sales.
- g. People who file UCC’s are called “secured creditors.” In many bankruptcies, only secured creditors recover much money.
- h. UCC’s can expire, typically after five years—but they can be renewed.
- i. UCC’s have to be filed in the right jurisdiction, where the art is located.
- j. Foreign countries do not always have similar laws. There is, for example, no UCC system in Switzerland. There, it is best to maintain a security interest by taking possession of the art.
- k. UCC’s can be amended, for example, to lower the amount or change the collateral that is identified as the security.
- l. UCC’s should describe the property in which there is a security interest, e.g., a painting by Jackson Pollock entitled “Drip” (1953), 55x72.
- m. UCC’s can be filed without the signature of the consignee if there is a consignment agreement that reflects the consignor’s security interest.
- n. UCC forms are public and can usually be viewed on line.
- o. In a bankruptcy, as happened, for example, in the *In re Morgansen’s Ltd.* case on Long Island and as is now being played out in the *Salander-O’Reilly* bankruptcy, those who consigned property to sell without filing UCC’s are left to fight over what is left in the bankrupt consignee’s estate after the secured creditors are paid.
- p. Dealers need to make sure that any UCC-1’s on consigned works are terminated at the time of the sale.

## TOP 10 UCC AND CONSIGNMENT AGREEMENT TIPS

- 1. Get it in writing.** As Sam Goldwyn said, “A verbal contract is not worth the paper it is printed on.”
- 2. Make it clear.** Doing so is harder than you think. Sayeth Groucho Marx: “I cannot say that I do not disagree with you.”
- 3. Do your homework.** Do the due diligence. Per the old British socialist Roger Tawney, “Not all property is theft, but a good deal of theft becomes property.”
- 4. Don't be afraid of UCC's.** Protect yourself, just in case. When you assume...
- 5. Remember your fiduciary duty.** Your loyalty is not to the deal—it is to your client. Make sure you know who that client is and remember that, your duty is higher than that “trodden by the crowd.”
- 6. Know who you are dealing with.** Are they honest? Are they competent?
- 7. Indemnify, Indemnify, Indemnify.** To paraphrase Thoreau—especially if you are the dealer getting the consignment. Why take all of the risk if you are only getting a small percentage of the profit?
- 8. Check the insurance.** Make sure you really see that you are an additional loss payee and that you know how long it lasts.
- 9. Check in regularly.** Don't just let the consignment sit there as circumstances may change.
- 10. Consult an attorney** when the size of the deal warrants it.

The URL to **search** for UCC's via New York's Department of State is:  
[http://appsext8.dos.state.ny.us/pls/ucc\\_public/web\\_search.main\\_frame](http://appsext8.dos.state.ny.us/pls/ucc_public/web_search.main_frame);

To **file** a UCC New York's Department of State , the URL is:  
[http://appsext8.dos.state.ny.us/pls/ucc\\_public/web\\_search.main\\_frame](http://appsext8.dos.state.ny.us/pls/ucc_public/web_search.main_frame)

The UCC form itself is at  
[https://appsext8.dos.state.ny.us/pls/efiling\\_public/eucc.eucc1\\_frm?pbutton=Reset](https://appsext8.dos.state.ny.us/pls/efiling_public/eucc.eucc1_frm?pbutton=Reset)

A company that conducts lien searches and provides similar services in New York and nationwide is:

**Corporation Service Company**

[https://www.cscglobal.com/global/web/csc/home?iq\\_id=10783926](https://www.cscglobal.com/global/web/csc/home?iq_id=10783926)

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